

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING JULY 19, 2013

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## THIS WEEK:

- **Theft by Deception; Sufficiency of Evidence**
- **Self Defense; Post Conviction Immunity**
- **Merger; Guilty Pleas**
- **Pre-Trial Immunity; Gang Affiliation**
- **Jury Instructions; Reckless Conduct**
- **Jurisdiction; Influencing a Witness**
- **First Offenders; Defendant's Misrepresentations**
- **Sufficiency of the Evidence; Jury Instructions**
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### ***Theft by Deception; Sufficiency of Evidence***

*Stratacos v. State, S12G0548 (7/11/13)*

Appellant was convicted of several counts of felony theft by deception based on a defendant's failure to fully perform services as promised. The evidence showed that appellant drafted and signed ten contracts with nine property owners promising to perform various home and business construction projects. Despite being paid all or part of the contract price up front, appellant failed to complete any of the ten jobs—and in four cases, he did not even start the work. Appellant contended that the State failed to prove the amount of the value of the services he actually performed as required under O.C.G.A. § 16-8-3(a) and

(b)(5). The Supreme Court upheld appellant's convictions on Counts 1, 4, and 5, specifying that although the Court of Appeals overlooked relevant portions of the law, the trial court did present sufficient evidence demonstrating a monetary shortfall required for a felony conviction under the statute. However, the Court held that the evidence was insufficient to sustain the conviction on Count 8.

To sustain a conviction under § 16-8-3(b)(5), the State must do more than simply prove that the defendant obtained property from the victim. The State must prove that the defendant did so through deceitful means and with the intention of ultimately depriving the owner of that property. Where the victim received nothing of value from the defendant in exchange for the money or other property that he gave to the defendant, there is no difference between the property initially obtained from the victim and the property of which the defendant intended to ultimately deprive the victim. But where the victim has received something of value from the defendant in exchange for his property, as in this case of an alleged violation under § 16-8-3(b)(5) for deceitfully promising services that were partially performed, the property the defendant initially obtains from the victim is not the amount of which the defendant intends to ultimately deprive the victim. Therefore, requiring the State to prove that the defendant intended to ultimately deprive the victim of some amount of property in order to convict under § 16-8-3(a) and (b)(5) remains important in distinguishing the crime of theft by deceitfully promising services from an ordinary contract dispute.

The Court noted that in addressing appellant's argument that the State had not proven "the value of the work done as opposed to

the value of the advances given to him,” the Court of Appeals relied on two cases applying O.C.G.A. § 16-8-3(a) and (b)(5): *Campbell v. State*, 286 Ga.App. (2007), and *Kimble v. State*, 209 Ga.App. 36 (1993). However, the relied-on cited portion of both cases did not mention a crucial element required to convict a defendant charged under § 16-8-3(a) and (b)(5) for an alleged deceitful promise to perform services: the intent to ultimately deprive the owner of some portion of his property. Moreover, although *Campbell* and *Kimble* took their litany of elements from *Holt v. State*, 184 Ga.App. 664 (1987), both cases unfortunately omitted the language in *Holt*, which stated that “[w]here it appears that advances were made and that the person to whom the advances were made performed a certain amount of service, but the value of such service is not made to appear, the prosecution fails to carry [its] burden of proof.” Whether the State had proved the value of the work the defendant actually performed was not the issue raised in *Campbell* or *Kimble*, so their omission of this portion of *Holt* was immaterial. But, it was the issue appellant raised in this case, and by overlooking this holding in *Holt*—along with the text of § 16-8-3(a)—the Court of Appeals reached the erroneous conclusion that there was no requirement to prove the value of work done and thus, held incorrectly that the State needed to prove only that appellant received money under the terms of the contract, he did not intend to perform all of the contracted services, and he did not return the money.

The Court further explained that if the State was content to have a § 16-8-3(b)(5) violation punished as a misdemeanor, then it need prove only that the value of any promised work the defendant performed was less, *by any amount*, than the value of the property he obtained from the victim. However, if the State seeks *felony* punishment, as it did for the four counts at issue in this case, then it must prove that the value of the property taken exceeded the felony threshold amount. For a theft conviction to be punishable as a felony at the time appellant allegedly committed his crimes, for example, the State had to prove that the property which was the subject of the theft exceeded \$500.00 in value. Because proof of that fact—that the property taken by theft was more than \$500 — increased the maximum penalty for violating O.C.G.A. § 16-8-3(a) and (b)(5), and the Constitution requires that

fact to be treated as an element of the crime, charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt.

Accordingly, in cases where the defendant has partially performed the deceitfully promised services, to have the defendant punished for a felony, the State must present evidence that allows the jury to find beyond a reasonable doubt that the difference between the value of the property the defendant initially obtained from the victim and the value of the services he actually provided is greater than the felony threshold. That means evidence of both the amount of money the victim paid the defendant and the value of the services the defendant performed for that money—or at least evidence that supports a reasonable inference that the difference between the two values exceeds the felony threshold. Otherwise, the State has not met its burden to prove that the defendant intended to, and did deprive his victim of a felonious amount of property, and the defendant may be convicted only of a misdemeanor violation of § 16-8-3(a) and (b)(5).

Here, the Court found, as to Count 8, the State failed to produce evidence demonstrating any shortfall to the alleged victim. The victim testified that: (1) the Company paid appellant a total of \$6,867 on a \$10,200 contract to insulate and reseal its office building’s roof; and (2) appellant delivered most if not all of the materials for the project, but he and some helpers performed just one day of work. Unlike the testimony of the victims of Counts 4 and 5, the evidence regarding Count 8 was insufficient for the jury to find, directly or by deduction, the value of the services appellant actually provided in exchange for what he was paid. The evidence showed that appellant performed some portion of the contract labor and delivered most or all of the materials covered by the contract, and the State did not present any evidence that allowed the jury to determine whether the services the Company received were worth less than the \$6,687 it paid him. Thus, the Court held, there was no direct evidence that the materials appellant delivered were worth less than \$6,867.

### **Self Defense; Post Conviction Immunity**

*Hipp v. State*, S12G1124 (7/11/13)

Appellant was convicted of aggravated assault and simple battery. The State appealed

after the trial court granted him a new trial. The record showed that at a pretrial hearing, appellant and his son testified in support of his self-defense claim; because the State presented no evidence, their evidence was uncontroverted. Nevertheless, the trial court denied the motion, finding that the words and actions of appellant suggested mutual combat rather than self-defense. Following a trial at which appellant presented a justification defense under O.C.G.A. § 16-3-21, the jury found him guilty. Appellant then file a motion for new trial, contending that the trial court had erred in its interlocutory order denying him immunity. Both the motion for new trial and pretrial order denying immunity were filed during the same term of court. The trial court granted the motion for new trial, ruling that a review of the evidence presented at the pretrial hearing demonstrated that appellant had established by a preponderance of the evidence that he was entitled to immunity under O.C.G.A. § 16-3-24.2. On appeal, the Court of Appeals reversed the trial court’s grant of a new trial and concluded that the trial court was not permitted to revisit its prior pretrial ruling or correct any purported error once the jury rejected appellant’s self-defense claim.

The Court stated that in criminal cases, a trial court has plenary power over its orders and judgments during the term at which they are entered and may amend, correct, or revoke them, for the purpose of promoting justice. This plenary control of the court over orders and judgments during the term at which they were rendered extends to all orders and judgments save those which are founded upon verdicts. The rationale is that a trial court should have the opportunity to revise its interlocutory rulings to reach the correct decision in the interests of justice and judicial economy. Moreover, relevant evidence may have changed as the case progressed, or the controlling law may have changed, or the court may simply recognize, upon further reflection, that it made the wrong decision. Moreover, under its plenary power, a trial court may rescind an order after the term when, as in this case, the proceedings to vacate the order were begun during the term in which it was entered.

Here, the Court concluded that the same inherent authority applies in this case to the trial court’s post-trial reversal of its pretrial ruling denying appellant’s motion for immunity from criminal prosecution under O.C.G.A.

§ 16-3-24.2. Also, the Court dismissed the State's assertion that because the jury had rejected appellant's self-defense claim, it was unable to revisit the issue. Moreover, the Court raised concerns that such a principle would lead to unsound or erroneous rulings. Therefore, the Court held, after a trial and prior to the entry of the final judgment, a trial court retains the inherent authority to reconsider its pretrial ruling on the defendant's motion for immunity from criminal prosecution under O.C.G.A. § 16-3-24.2.

## **Merger; Guilty Pleas**

*Nazario v. State, S13A0006 (7/11/13)*

Appellant pled guilty to 17 counts of a 26-count indictment charging him with numerous crimes related to the beating and stabbing death of his girlfriend and the mistreatment of her three young daughters. Despite appellant's argument at the plea hearing that several of his 17 convictions merged, the trial court sentenced him for all 17 crimes. On direct appeal, appellant claimed that several of his convictions and sentences were void because they merged.

The State contended that appellant's entry of a guilty plea waived any and all merger claims. The Court disagreed. The Court distinguished a line of Court of Appeals cases that the State argued held that a guilty plea waived merger claims. Under O.C.G.A. § 16-1-7(a), a defendant may not be legally convicted of a crime that is included as a matter of law or fact in another crime for which the defendant also stands convicted. A conviction that merges with another conviction is void—a nullity—and a sentence imposed on such a void conviction is illegal and will be vacated if noticed by the Court, even if no merger claim was raised in the trial court and even if the defendant did not enumerate the error on appeal. Nevertheless, the merger issue must arise in a proceeding in which void convictions may be challenged; but a direct appeal is such a proceeding.

However, the merger of the convictions at issue must, of course, be established by the record. As a practical matter, the Court noted, because the factual record in a guilty plea case is usually very limited, defendants who raise merger claims after pleading guilty, particularly claims that a conviction merged as a matter of fact, will rarely prevail. But while

defendants who plead guilty waive trial, and the more fully developed factual record that a trial produces, they do not waive appellate review of merger claims, which are a species of void-conviction claims—claims long recognized as an appropriate issue to consider on appeal from a guilty plea.

Accordingly, the Court held, appellant's merger claims were not waived. However, in reviewing the merits of appellant's arguments, and largely because of the limited factual record resulting from his guilty plea, the Court found that appellant could not show that most of his merger claims had merit, and the Court affirmed most of his convictions and sentences. But, the Court found, one of appellant's merger arguments was correct. Both the indictment and the factual basis for the guilty plea showed that appellant's five separate convictions for concealing the death of his girlfriend merged into a single conviction and should have resulted in only one sentence for that crime rather than the five separate sentences that the trial court imposed. Therefore, the Court vacated four of his five concealment convictions and sentences.

## **Pre-Trial Immunity; Gang Affiliation**

*Sifuentes v. State, S13A0083; S13A0084 (7/11/13)*

Appellant brothers, Gerardo and Eduardo, were tried as co-defendants in the shooting death of the victim. The evidence showed that appellants got in an argument with a rival gang and after someone "disrespected" a member's wife, the argument escalated. The groups began advancing towards each other, and Gerardo, who later admitted to police that he was angry at the time, brandished his shotgun. Gerardo then fired the gun, fatally striking the victim in the chest while striking two others in the group. After the shots were fired, appellants fled the scene.

Gerardo claimed that the trial court erred by denying his pretrial motion for immunity under O.C.G.A. § 16-3-24.2. He claimed that he was justified in using deadly force in defense of himself and his co-defendant brother under O.C.G.A. § 16-3-21(a). To prevail on the immunity motion, appellant was required to establish his justification defense by a preponderance of the evidence. The evidence at the pretrial hearing showed a history of rivalry

between the Norteno and Sureno gangs; Gerardo's affiliation with the Nortenos; and prior difficulties between Eduardo and members of the Surenos. The evidence further reflected that Gerardo was summoned to come to area by Eduardo in response to being punched in the face by a Sureno affiliate, and that he brought a 12-gauge shotgun, which was later found to have fired the fatal bullet. After arriving at the apartments, Gerardo saw one member of the group with a gun, but never saw it being pointed at him or his brother. He admitted to being "heated up" over the attack on his brother. At the time Gerardo opened fire, the Surenos were some measurable distance away from him, the person with the gun had disappeared to the back of the Sureno group, and Gerardo saw no other weapons. Thus, the Court found, the evidence supported a finding that the shooting was motivated by gang rivalry and a desire for revenge, rather than self-defense. Therefore, the trial court did not err in concluding that Gerardo had not carried his burden to prove justification so as to entitle him to immunity.

Next, appellants contended that the trial court erred by admitting over objection the video recordings, seized from the brothers' home in a police investigation prior to the crimes at issue here, depicting gang-related images and activities. Appellants contend these recordings were more prejudicial than probative and that the trial court thus erred in admitting them. The Court disagreed. In order to prove the offense of criminal street gang activity under O.C.G.A. § 16-15-4, the State was required to prove the existence of a criminal street gang, which "may be established by evidence of a common name or common identifying signs, symbols, tattoos, graffiti, or attire or other distinguishing characteristics." The videotapes at issue here were relevant in proving the existence of the Norteno gang and appellants' affiliation with it, essential elements of the street gang crimes which the State was required to prove beyond a reasonable doubt. The fact that the videos were made approximately two years prior to the crimes at issue went to their evidentiary weight and did not render them inadmissible. Therefore, the Court held, the trial court did not err in admitting the videotapes.

## Jury Instructions; Reckless Conduct

*Mathis v. State, S13A0068 (5/20/13)*

Appellant was convicted of felony murder, aggravated battery, cruelty to a child, and battery, all in connection with the death of his infant son. During the pregnancy of the mother, appellant provided no financial or other support to her; threatened to have someone punch the mother in the stomach; and, when she was six months pregnant, threw a spray bottle at her during an argument. In May 2009, the mother began seeking child support payments from appellant. On the night of September 15-16, 2009, appellant picked up the child from his mother's home and brought him to spend the night at his aunt's home, which was occupied by appellant's family and relatives. Late in the evening, appellant claimed that the child fell off the bed and that he had successfully applied ice to bring down his swelling in his right eye. The next morning, appellant called out that the child was not breathing. An ambulance was summoned: a paramedic arrived within three minutes of the call; the victim was not breathing, had a weak pulse, and his skin was still warm and dry, all indicating his respiratory distress occurred very recently; and, the knot on his head increased in size during the trip to the hospital, also indicating a recent injury.

Appellant contended that the jury should have been instructed on the law regarding involuntary manslaughter under O.C.G.A. § 16-5-3(a), urging that he could have been found guilty of causing the child's death by leaving him to sleep on the bed with the two other occupants of the home, which could be considered misdemeanor reckless conduct under O.C.G.A. § 16-5-60; he also asserted that failing to promptly seek medical care constituted reckless conduct.

As to placing the child on the bed in the manner that appellant testified he did, the Court noted that appellant cited no authority for concluding that in doing so, he "disregard[ed] a substantial and unjustifiable risk," endangering the child's safety such that it was "a gross deviation from the standard of care which a reasonable person would exercise in the situation," all of which would be required to find that appellant committed the misdemeanor of reckless conduct. Alternatively, even if that act constituted a misdemeanor, the undisputed evidence was

that a fall from the bed could not have caused the child's death, as would have been required under O.C.G.A. § 16-5-3(a).

Moreover, in regard to the failure to get medical attention, there was no evidence that appellant failed to get medical attention for the child on the morning of his death; appellant and others testified that when he awoke and recognized the child in distress, he promptly acted to get help, including calling for an ambulance. Although appellant asserted that medical help could have been summoned the previous night, the only evidence of an injury to the child at that time was appellant's own testimony, which was that the child was calm, the injury did not give a cause for "panic," and that the swelling went down with the application of ice; he did not testify that the child appeared in any distress. His testimony, if believed, was not evidence to support a finding that appellant "disregard[ed] a substantial and unjustifiable risk," i.e., failing to seek immediate medical attention would endanger the child's safety, such that it was "a gross deviation from the standard of care which a reasonable person would exercise in the situation," as would be required to find that appellant committed the misdemeanor of reckless conduct as defined by O.C.G.A. § 16-5-60. And again, the Court noted, the undisputed testimony was that the cause of the child's death was blunt force trauma, not failure to seek medical care.

Next, appellant contended that when the trial court gave the pattern jury instruction for the defense of accident, under Vol. II: Criminal Cases, § 1.41.30 (4th ed. 2007), it should not have omitted the phrase "criminal negligence." The Court noted that despite the trial court's correct conclusion that the evidence did not support a finding of reckless conduct, appellant argued that this case was nonetheless one in which the phrase "criminal negligence" was applicable to an instruction on accident. But, the Court further noted, because appellant made no objection to the instruction as given, its review was limited to a determination of whether the trial court's instruction constituted plain error.

Here, the Court found, it was questionable whether any instruction on accident was warranted because appellant did not admit to committing any act that resulted in the death of the child. But, assuming that such an instruction was warranted, and disregarding whether there might be error, clear or

otherwise, in the trial court's omission of the phrase "criminal negligence" under the facts of this case, the Court held that there was no likelihood that the omission affected the outcome of the trial. The instruction as given informed the jury that for it to find appellant not guilty by reason of accident, there must be no criminal scheme, undertaking, or intention. Under appellant's argument, the jury should have been informed that there must be no criminal scheme, undertaking, intention, *or criminal negligence*. In other words, the Court noted, what appellant claimed to be the proper instruction would have required the jury to make an *additional finding* before it could find him not guilty, rather than the instruction given at his trial. Therefore, the Court held, the instruction as given, actually made it easier for the jury to acquit and thus, the Court could not conclude that the omission of the term "criminal negligence" from the instruction on accident affected the outcome of appellant's trial.

## Jurisdiction; Influencing a Witness

*Brown v. State, A13A0182 (6/27/13)*

Appellant, the former president and CEO of Electric Membership Corporation ("EMC"), was first indicted on January 6, 2011 (the "First Indictment"). The trial court quashed the First Indictment on March 24, 2011, because it found that it was not returned in open court as required by Georgia law, and the State appealed (the "First Appeal"). The Court affirmed the trial court's order on March 29, 2012, but the Supreme Court of Georgia granted the State's petition for writ of certiorari and the matter remained pending before that Court at the time of the decision.

On July 7, 2011, while the First Appeal was still before the Court of Appeals, the State obtained a new indictment against appellant (the "Second Indictment"). The appellate record in this case did not contain a copy of the First Indictment; however, according to the trial court, the Second Indictment contained the same charges as in the First Indictment, but in addition identified by name many victims age sixty-five or older. The charges included allegations of theft by taking, filing false statements and writing, conspiracy to defraud the county, conspiracy to defraud the County School District, and violations of

the Georgia RICO statute. In addition, the Second Indictment also contained four apparently new counts, Counts 32 through 35, which asserted that appellant, individually and in concert with others, violated O.C.G.A. §§ 16-10-32 and 16-10-93 by conspiring to file a civil lawsuit against individuals who allegedly cooperated with the State to bring charges against him.

Appellant moved to quash the Second Indictment, asserting that the pendency of the prior appeal deprived the trial court of jurisdiction to return an indictment charging the same or similar offenses. First, the Court noted that the jurisdictional issue here had been raised in *Roberts v. State*, 279 Ga.App. 434 (2006). In that case, the Court found that, filing a notice of appeal divests the trial court of jurisdiction in some matters, but not in all. As applied to a criminal case, the filing of a notice of appeal merely deprives the trial court of its power to execute the sentence. Generally, a trial court may not alter a judgment or order while an appeal of that particular judgment or order is pending before the appellate court, *nor may a trial court initiate proceedings that require a ruling on the exact matter being appealed*. (Emphasis supplied.) Although a trial court is forbidden from taking actions that directly affect an issue on appeal, such loss of jurisdiction is limited to only those proceedings which either requires a ruling on the matters on appeal or directly or indirectly affect such matters.

Thus, the Court noted, the real issue was whether the return of the Second Indictment required the trial court to issue a ruling on the exact matter being considered in the First Appeal, or whether it directly or indirectly affected such matters. The Court concluded that it did not. The First Appeal concerned the issue of whether the First Indictment was read in open court as required under Georgia law. The Second Indictment initiated a completely separate prosecution on the same charges, and no contention was raised that the Second Indictment suffered from the same infirmity as the First Indictment. Thus, the trial court's acceptance of the Second Indictment had no effect on the issue of whether the First Indictment was valid, and the trial court thus had jurisdiction to consider the Second Indictment.

Next, appellant argued that the trial court erred in denying his general and special demurrer to Counts 32 to 35 of the indict-

ment. He asserted that the alleged filing of a civil lawsuit against persons cooperating with the prosecution in a criminal case cannot constitute an offense pursuant to O.C.G.A. § 16-10-32 or O.C.G.A. § 16-10-93. The Court agreed. The Court determined that threatening to ostensibly exercise one's legitimate right to file a lawsuit is not encompassed by O.C.G.A. § 16-10-93(a) because such a threat is neither a *per se* threat to a person nor to property. Thus, the Court concluded, actually exercising one's right to file a lawsuit, or as alleged in this case, conspiring with others to file a lawsuit, in and of itself, does not constitute a "threat" as required to support the crimes under O.C.G.A. §§ 16-10-93 or 16-10-32 as alleged in Counts 32 to 35. Accordingly, the trial court erred in not denying appellant's demurrers to Counts 32 to 35 of the Second Indictment.

### ***First Offenders; Defendant's Misrepresentations***

*Smith v. State, A13A0320 (7/11/13)*

Appellant was charged by accusation in 2006 with possession of cocaine with the intent to distribute and unlawful possession of lidocaine, a dangerous drug. On October 11, 2007, he entered into a negotiated plea of guilty to the lesser included offense of possession of cocaine and was sentenced to six years of probation and intensive probation supervision. At the plea hearing, the State relayed that appellant had a prior felony conviction from 1990 for burglary, a 1991 misdemeanor shoplifting conviction and two driving with suspended license convictions from 1998 and 2000. Appellant's attorney asked that, since "there's never been a prior drug offense," the trial court sentence appellant under O.C.G.A. § 16-13-2, which authorizes a conditional discharge for first offenders, and the State responded that it did not object. Appellant was then sentenced as a first offender.

On October 3, 2011, a warrant was issued for appellant's arrest for violating his probation. At the probation revocation hearing on February 9, 2012, the trial court found appellant guilty by a preponderance of the evidence, but deferred disposition until a later time. Appellant then filed a motion to withdraw his guilty plea on February 16, 2012, alleging that the October 2007 possession of cocaine sentence was "illegal" because he had a March 14, 1996 conviction for VGCSA. On February 22,

2012, appellant also filed a motion to set aside his sentence in which he again alleged that the October 2007 sentence was an illegal sentence and asserted that it was not authorized under O.C.G.A. § 16-13-2 because of his prior March 1996 felony sentence for VGCSA. The trial court denied both motions and adjudicated him guilty of the October 2007 possession of cocaine, revoked his probation and sentenced him to 20 years, to serve the first six years in confinement.

Appellant contended that the trial court erred by denying his motion to withdraw his guilty plea because the original sentence imposed was void. Specifically, he contended that the October 11, 2007 sentence was void because he was not eligible for sentencing under O.C.G.A. § 16-13-2 because of a prior felony conviction for VGCSA for possession of marijuana with the intent to distribute. As a rule, the Court stated, a defendant has an absolute right to withdraw his plea before sentence is pronounced. Since a void sentence is the same as no sentence at all, the defendant stands in the position as if he had pled guilty and not been sentenced, and so may withdraw his guilty plea as of right before resentencing, even following the expiration of the term of court in which the void sentence was pronounced.

Regarding appellant's contention that his sentence was void because he was ineligible to be sentenced under the conditional discharge provision of O.C.G.A. § 16-13-2, the Court noted in similar circumstances where the defendant had failed to disclose a disqualifying prior conviction before being sentenced as a first offender, that defrauding the court as to eligibility for these special sentencing provisions acts as a waiver on appeal. Similarly, appellant was aware that he was ineligible under O.C.G.A. § 16-13-2 for conditional discharge as a first offender; a fact that he kept hidden until he faced sentencing after his probation revocation adjudication. At that point, he disingenuously recalled his prior felony conviction for VGCSA which made him ineligible for the conditional discharge provisions of O.C.G.A. § 16-13-2, and asserted that the ensuing sentence was void. Accordingly, the Court held, appellant knowingly defrauded the trial court by assenting to his eligibility for sentencing under O.C.G.A. § 16-13-2, and thus, he could not request relief from error that his misconduct caused.

## **Sufficiency of the Evidence; Jury Instructions**

*Le noir v. State, A13A0128 (7/2/13)*

In connection with an attack upon his then-fiancé and in the presence of her young son, appellant was convicted of aggravated battery, sexual battery, false imprisonment, criminal damage to property in the second degree, cruelty to children in the second degree, and interference with a 911 call. The evidence showed that after a night of drinking, appellant attacked his fiancé for well over an hour. On appeal, he contended that the evidence was insufficient to support the conviction of criminal damage to property in the second degree.

O.C.G.A. § 16-7-23(a) defines, “[a] person commits the offense of criminal damage to property in the second degree when he . . . [i]ntentionally damages any property of another person without his consent and the damage thereto exceeds \$500.00.” Appellant was alleged to have committed this crime by “unlawfully and intentionally damag[ing] the property of [the fiancé], to wit: household items and furniture, without the said person’s consent, said damage exceeding \$500.00.” Appellant argued that the State failed to prove that he was guilty of that crime because no evidence was presented as to the value of the property. The State responded that it could not find any evidence in the record as to presentation of the evidence regarding the value of the property and thus posited that appellant was entitled to relief from that conviction.

When an appellant challenges the sufficiency of the evidence to support a conviction, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Having examined the evidence in that light, the Court concluded that there was no competent evidence from which the jury could determine that the value of the damage for which defendant was responsible was in excess of \$500 and therefore, appellant’s conviction for damaging the fiancé’s property was reversed.

Appellant also argued that his aggravated battery conviction should be reversed because the trial court “overcharged” the jury when defining that offense during the final charge. O.C.G.A. § 16-5-24(a) defines, “A person commits the offense of aggravated battery when

he or she maliciously causes bodily harm to another by depriving him or her of a member of his or her body, by rendering a member of his or her body useless, or by seriously disfiguring his or her body or a member thereof.” Appellant was alleged to have committed battery by “maliciously caus[ing] bodily harm to the person of [the fiancé], by seriously disfiguring her body by causing severe lacerations to her scalp and face, by repeatedly striking her in the head with a wooden table leg and broken wooden picture frame.” But, the trial judge minimally tailored the statutory provision defining that crime, hence instructing the jury, “A person commits the offense of Aggravated Battery when he or she maliciously causes bodily harm to another by depriving her of a member of her body, by rendering a member of her body useless, or by seriously disfiguring her body or any member thereof.”

The Court stated that pretermitting whether appellant waived the issue by neither objecting to the instruction nor reserving objections for later, the trial court committed no harmful error. Where the indictment charges a defendant committed an offense by one method, it is reversible error for the court to instruct the jury that the offense could be committed by other statutory methods with no limiting instruction. The defect is cured, however, where the court provides the jury with the indictment and instructs jurors that the burden of proof rests upon the State to prove every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt. Here, the Court found, the record showed that the trial court provided the jury with the indictment and instructed the jurors that the burden of proof was with the State to prove every material allegation of the crimes charged in the indictment and every essential element of each such crime beyond a reasonable doubt. Therefore, appellant failed to show harmful error because any error in overcharging the jury on aggravated battery was cured.

## **Jury Instructions; Plain Error**

*Ferguson v. State, A13A0495 (7/1/13)*

Appellant was convicted of aggravated assault. He contended that the trial court erred in several respects in its charge to the jury. The Court noted that because the record showed that defense counsel did not object after the

trial court gave its charge, the Court’s review was limited to a determination of whether the trial court committed plain error in its jury instructions.

First, appellant contended that the court erred by failing to give the jury his requested charge that fists are not deadly weapons per se as contemplated by the aggravated assault statute. However, the Court found, the indictment did not allege that appellant’s fists were deadly weapons. Moreover, the jury charge given required the State to prove that appellant committed aggravated assault in the manner set forth in the indictment. As such, a jury instruction concerning whether fists are deadly weapons per se would not have been adjusted to the facts and circumstances of the case, and the trial court committed no error in failing to give such a charge. Thus, the Court held, appellant’s contention could not make it past the first prong of the plain error review.

Next, appellant contended that the court failed to give a proper jury charge on the issue of justified use of force to defend against another’s use of unlawful force. Specifically, he asserted that a proper charge would have allowed the jury to consider appellant’s actions in reference to the threat he felt was offered by the victim when she had a knife. The trial court pertinently instructed the jury, “[a] person is justified in threatening or using force against another person when and to the extent that he reasonable—he reasonably believes that such threat or force is necessary to defend himself against the other’s imminent use of unlawful force. A person is justified in using force that is intended or likely to cause death or great bodily harm only if that person reasonably believes that such force is necessary to prevent death or great bodily injury to himself or to prevent the commission of a forcible felony.” Here, the Court held that the charge given was a correct statement of the law and, contrary to appellant’s claim, it instructed the jury that it was allowed to consider his actions in reference to the threat allegedly presented by the victim. Thus, it could not be seriously contended that the trial court committed clear or obvious error that is necessary for plain error.

Lastly, appellant argued that the trial court erred by failing to instruct the jury that the State has the burden of proving that the defendant was not justified in using force. However, the trial court in fact instructed the jury: “[a]n ‘affirmative defense’ is a defense

that admits the doing of the act charged, but seeks to justify, excuse, or mitigate it. Once an affirmative defense is raised, the burden is on the State to disprove it beyond a reasonable doubt.” The court then explained justification, and further instructed the jury: “The State has the burden of proving beyond a reasonable doubt that the defendant was not justified.” These were correct statements of the law and therefore, the Court held that the trial court made no error in its jury charge, and appellant’s claim could not make it past the first prong of the plain error review.

## Special Demurrers

*Hairston v. State, A13A0641 (7/1/13)*

Appellant was convicted of kidnapping with bodily injury, aggravated battery (family violence) and aggravated assault (family violence). He contended that the trial court erred in overruling his special demurrer. The record showed that appellant filed his special demurrer on December 1, 2010, maintaining that the indictment failed to state with certainty the time and place of the offenses, and failed to adequately describe the manner of the offenses and failed to adequately describe the *corpus delicti*. Appellant was arraigned on December 9, 2010, and he subsequently filed an amended special demurrer on February 11, 2011, asserting that the indictment was too vague and did not apprise him of exactly how he “did abduct and steal away [the victim],” held her against her will, or specify the bodily injury she received. After a hearing on the motion, the trial court found that the amended special demurrer was untimely because the amended grounds were not connected with the original grounds that were filed in the initially filed special demurrer. The court also rejected the special demurrer on the merits.

The Court stated that an accused may challenge the sufficiency of an indictment by filing a general or special demurrer. A special demurrer must be raised before pleading to the merits of the indictment and if no special demurrer is made, the ground is waived. A special demurrer challenges the sufficiency of the form of the indictment. By special demurrer, an accused claims, not that the charge in an indictment is fatally defective and incapable of supporting a conviction but rather that the charge is imperfect as to form or that the accused is entitled to more information.

When determining whether an indictment is sufficient to withstand a special demurrer, the applicable standard is not whether the indictment could have been made more definite and certain, but whether it contained the elements of the offense intended to be charged, and sufficiently apprised the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record showed with accuracy to what extent he may plead a former acquittal or conviction.

Here, the indictment charged that appellant did, “abduct and steal away [the victim], a person, without lawful authority and did hold said person against her will, and said person received bodily injury.” O.C.G.A. § 16-5-40(a) and (b) provide that kidnapping with bodily injury occurs when “[a] person . . . abducts or steals away any person without lawful authority or warrant and holds such person against [her] will,” and “the person kidnapped shall have received bodily injury.” Premitting the issue of the timeliness of the amended special demurrer, the Court found that the trial court did not err in overruling it on the merits. In his amended special demurrer and at trial, appellant argued that the indictment should specify more specifically the movement that occurred to satisfy the asportation element of the kidnapping count because he could admit to abducting and stealing away the victim, but not be guilty of kidnapping under the statute because the movement could be incidental to the other two family violence charges. However, as the trial court noted, whether the movement was sufficient for a conviction on the kidnapping charge is a jury determination. Moreover, a motion seeking to dismiss an indictment on the ground that the State cannot prove facts essential to the charge is analogous to a motion for summary judgment in a civil case, and there is no basis in Georgia criminal practice for what, in civil practice, would be termed a motion for summary judgment. Moreover, the Court noted, O.C.G.A. § 17-7-54(a) holds that, “[e]very indictment of the grand jury which states the offense in the terms and language of this Code or so plainly that the nature of the offense charged may easily be understood by the jury shall be deemed sufficiently technical and correct.” Therefore, the Court held, because the indictment used the language of the statute and included the essential elements of the offense, it was suf-

ficiently definite to advise appellant of his charges and not subject to dismissal.

## Business Records; Hearsay

*Strobel v. State, A13A0583 (7/1/2013)*

Appellant was convicted of a single count of first degree arson. He contended that the trial court erred by admitting into evidence a credit card receipt—which he specifically asserted was an unauthenticated business record—without requiring the State to establish a proper foundation. The evidence showed that firefighters responded to a call to appellant’s girlfriend’s home. The investigation revealed that the cause of the fire was by “an intentional human act” and a State Farm insurance representative confirmed that fact. Appellant was then questioned about the fire, and he claimed that he and his girlfriend had left the day before to go to Washington, D.C. for the inauguration, but it was later determined that the couple had not traveled to Washington. Upon execution of a search warrant at appellant’s home, the arson investigator discovered “large amounts” of items belonging to the girlfriend, including clothing, shoes, jewelry, personal keepsakes, and financial records. A search of storage units rented by appellant revealed more personal items of his girlfriend that were of a “precious” nature. Later in the investigation, appellant admitted to the arson investigator that he had driven his girlfriend to her house “to set [it] . . . on fire.” At the trial, however, he testified that the statement was a lie, that he had lied about the trip to the inauguration, that he had made the statement to get his girlfriend in trouble, and denied any involvement with the fire.

Appellant contended that the trial court erred in admitting “unauthenticated” credit card receipts from a hotel in Charlotte, North Carolina pursuant to the business records exception to the hearsay rule, O.C.G.A. § 24-3-14. Although hearsay evidence is generally inadmissible, O.C.G.A. § 24-3-14 provides an exception for the admission of business records that would otherwise be excluded as hearsay. To introduce a writing under the business records exception to the hearsay rule, a witness must lay a foundation indicating that he or she is aware of the method of keeping the documents. It is not required that the witness made the records or kept them under his or her supervision or control. Instead, the witness

must be able to testify that the record was made (1) in the regular course of business, and (2) at the time of the event or within a reasonable time of the event. The witness's lack of personal knowledge regarding how the records were created does not render them inadmissible, but merely affects the weight given to the evidence.

Here, a deputy fire marshal involved in executing a search of the hotel rooms where appellant's girlfriend was staying after the fire testified that they had recovered two credit receipts from a hotel in Charlotte dated January 18 and 19, 2008. Appellant objected that "there's no foundation. That's a business record," and that there was "no authentication." The trial court responded that it thought the objection was to hearsay, but appellant said that he did not think the receipt was hearsay and he was not objecting on that basis. The trial court overruled the objection. However, the State maintained that appellant objected on the basis that the receipts were not properly authenticated rather than hearsay, and thus O.C.G.A. § 24-3-14(b) was not applicable. Additionally, the State asserted that the inquiry into whether the receipts were properly admitted was pursuant to O.C.G.A. § 24-7-4(4) and that because the receipts were only "collaterally material" to the case, the lack of authentication argument failed.

The Court held that even assuming without deciding that a proper foundation was not presented for introduction of the receipts into evidence, such error was harmless as appellant admitted that he lied about the Washington trip and had instead gone to Charlotte. Moreover, the hotel receipts were not critical but merely cumulative of evidence that was already before the jury through appellant's own testimony. Thus, any error in admitting the receipts was harmless.